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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 64

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

ELISHA HANSON,
Counsel for Amicus Curiae.

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in the above entitled case in support of petitioners herein.

Statement of the Case.

In the interest of brevity the Amicus Curiae relies upon the statement of the case as set forth in the brief of petitioners herein.

Interest of the Amicus Curiæ.

The American Newspaper Publishers Association is a membership corporation organized and existing under the

laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

The Association is vitally interested in a clarification by this Court of the fundamental issue presented in this case, namely, the limits of editorial comment by newspapers upon matters of great public importance pending in or decided by the courts.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news and editorial comment.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

The Amicus Curiae submits that the judgments of conviction for contempt here under review constitute an abridgment of the foregoing functions of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved.

The First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT.

Point I.

The exercise of the judicial power to punish for contempt by publication imposes upon the courts the duty of reconciling the constitutional right of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States with the right of the judiciary to maintain its independence and the orderliness of the judicial process. The proper accommodation between these two rights so as to preserve the essentials of both ultimately rests upon the courts themselves and their own sense of self-restraint.

In this case this Court is confronted with the task of reconciling two rights "in order to prevent either from destroying the other." One right is the freedom of the press, which is secured against abridgment by all branches of the Federal and State governments by the First and Fourteenth Amendments to the Constitution of the United States. The other right is that of the judicial branch of the government to maintain its independence and the orderliness of the judicial process. Underlying the reconciliation of these rights lies a balancing of individual and social interests in freedom of discussion on matters of public con-

cern, such as this Court has recognized in other cases involving constitutional guarantees of civil liberties.[1]

In this case much more is at stake than the individual interest of a newspaper publisher in giving expression to his opinions on matters deemed by him to be of vital public importance. Freedom of the press is not a special privilege accorded to a particular class. It reflects a general social interest. Behind it lies the right of the people to have information and opinion on matters of public concern gath-

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[1] A recent case in which this balancing of interests is exemplified is *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). See also, *Carlson* v. *California*, 310 U. S. 106 (1940). The same method was employed by Justice Gibson in his dissenting opinion in the present case in the Supreme Court of California. 98 P. (2d) 1029, 1041 (1940) (R. 140-148).

Professor E. F. Albertsworth, of Northwestern University Law School, has stated the interests involved as follows:

> "In every contempt proceeding, of course, there come into conflict two vitally important social interests. First, the social interest that justice be fearlessly and impartially administered and that the courts be unembarrassed in executing their judgments and decrees; secondly, that fair comment may be indulged in by the public on the reasoning in the opinion as well as the judgment itself, for this fair comment is one of the great safeguards against judicial tyranny and a poor quality of judicial decisions." (1925) 20 Ill. L. Rev. 191.

Another writer has indicated the conflicting interests in the following:

> "If the public may override the courts and sap their strength to the degree that their independence no longer obtains, then the institution of legitimate trial will gradually wither away. But if the courts may so arbitrarily hold themselves aloof from reproach that the popular conception of justice is not at all considered then democracy must merge into autocracy. Of the two, this is the greater danger." Chused, Public Comment as Contempt of Court (1930) 16 St. Louis L. Rev. 24, 48.

> "• • • the best test of truth is the power of the thought to get itself accepted in the competition of the market • • •." Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919).

> "It is in small encroachments upon the right of free criticism of all the acts of public officials that the real danger lies." Learned Hand, J., in *Ex parte Craig*, 282 Fed. 138, 160 (C. C. A. 2d, 1922).

ered and disseminated through the medium of the press.[2] The protection of the press, therefore, transcends mere individual rights. Historical considerations recognized by this Court unmistakably reveal the paramount significance of the larger objective in the discovery and diffusion of knowledge and opinion on public questions.

The grave importance of the preservation of this bulwark of the democratic process was recently given forceful expression in *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940) where this Court succinctly characterized freedom of speech and of the press as follows:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them

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[2] Eminent authorities have made similar observations. Judge Cooley has said:

> "• • • their purpose [freedom of speech and of the press] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. • • • The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley, Constitutional Limitations (8th ed.), p. 886 (1927).

Lord Bryce observed:

> "The more completely popular sovereignty prevails in a country, so much the more important is it that the organs of opinion should be adequate to its expression, prompt, full, and unmistakable in their utterances. • • •
>
> "The press, and particularly the newspaper press, stands by common consent first among the organs of opinion." 2 Bryce, American Commonwealth (rev. ed. 1927) pp. 274-275.

Professor Zechariah Chafee, Jr., has characterized the right to a free press as "a declaration of national policy in favor of the public discussion of all public questions." Chafee, Freedom of Speech, p. 5 (1920).

> and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

In balancing the public interest in the dissemination of information through the expression of opinion in the press and the public interest in an independent judicial system, the courts are the guardians of our deeply-cherished liberties. If these interests come into apparent conflict, it is the duty of the courts to make a proper accommodation between them so as to preserve the essentials of both. In the last analysis the ultimate responsibility for arriving at a proper balance between an unfettered press and an independent judiciary rests upon the courts themselves and their own sense of self-restraint.

This is especially true when the courts assert the power to punish for contempt by publication. The origin of this power has been questioned by legal historians[3] and its exercise has been frequently accompanied by widespread dissatisfaction.[4] But even if it is conceded that this power is entrenched in our jurisprudence as one of the so-called inherent powers of the courts, it should be exercised with utmost delicacy and caution because of its very nature.

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[3] Fox, History of Contempt of Court (1927); Thomas, Problems of Contempt of Court (1934).

[4] See Nelles & King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 401, 525; (1938) 48 Yale L. J. 54.

As Justice Gibson, in his dissenting opinion in the Supreme Court of California, aptly said, this venture into summary punishment presents the amazing "spectacle of a judicial officer acting as prosecutor and judge, and meting out punishment besides * * *."[5]

Many writers have shown that this combination of functions is traditionally at war with the conception of fairness in American judicial procedure and that it contains the seeds of arbitrariness and injustice.[6] When applied to the press, the judicial power to punish contempt alleged to have occurred by publication should be scrupulously confined to the clearest cases where the publication is unmistakably beyond the limits of fair comment and criticism on matters of public concern.

The principles heretofore laid down by this Court as guides in balancing a free press against a free judiciary demonstrate that in the present case the lower courts erred in punishing the publications here in question as contemptuous.

Freedom of the press is an historic concept written into our early State constitutions and into the First Amendment to the Constitution of the United States. Today it is a part of the organic law of every State in the Union, guaranteed against abridgment by the due process clause of the Fourteenth Amendment to our Federal Constitution.

In the basic case of *Near* v. *Minnesota*, 283 U. S. 697 (1931), the nature and scope of the freedom of the press

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[5] 98 P. (2d) at p. 1042 (R. 142). Summary punishment for contempt by publication is used herein in the sense of punishment at the discretion of the court as opposed to punishment after conviction by a jury.

[6] See notes 3 and 4, supra. In his dissenting opinion in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 423 (1918), Mr. Justice Holmes said: "When it is considered how contrary it is to our practice and ways of thinking for the same person to be the accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their [the courts'] presence' * * *."

guarantee were fully analyzed. In that case this Court for the first time specifically declared that the freedom of the press secured by the First Amendment against abridgment by the United States is also secured by the Fourteenth Amendment against abridgment by a State.

To determine the content of the guarantee, the court looked to the historical background of the First Amendment. Mr. Chief Justice Hughes quoted from Madison to the effect that liberty of the press constituted a grant of immunity from previous executive and legislative restraint or censorship. But this Court made it plain that immunity from prior restraints or censorship does not exhaust the constitutional guarantee. The guarantee extends to any form of abridgment of a free press and protects the press against punishment subsequent to publication which does not constitute a clear abuse of the liberty of the press. In its most recent opinion on the subject in *Thornhill* v. *Alabama*, 310 U. S. 88, 101 (1940), this Court said:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the 'five great rights' and said: 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive

> officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

The rationale of *Near* v. *Minnesota, supra,* removes any doubt that a free press applies to encroachments by the judicial branch of the government. Any other doctrine would be anomalous in that it would immunize the judiciary against the constitutional limitations imposed upon the other branches of the government. This would have the untenable consequence of making judges paramount to the Constitution and to the government of which they are an integral part.

Since *Near* v. *Minnesota,* this Court has so frequently affirmed and reaffirmed the foregoing doctrines as to evince a determination "to preserve an untrammeled press as a vital source of public information".[7] In *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250 (1936), the Court said:

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * *
>
> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

[7] *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State (Town of Irvington),* 308 U. S. 147, (1939).

It is especially noteworthy that in its decisions this Court has never sought to distinguish freedom of speech and freedom of the press. In many instances it has applied the same principles to both, citing in support thereof free speech and free press cases.[8]

The most striking feature of this impressive line of decisions is the unflinching determination of this Court to condemn every conceivable form of abridgment of the press from any source and by any method. This is not to assert, as some detractors of this liberty would have it believed, that the constitutional guarantee is so literally absolute as to exempt the press from answerability for abuses to which the general laws apply. Such a claim would be refuted by the expressions of this Court in the *Near* opinion itself, where it was pointed out that the press was subject to laws imposing civil liability for publishing libellous matter.

When this Court said in *Near* v. *Minnesota*, *supra*, that subsequent punishment for such abuses as may exist is the appropriate remedy, it was not unmindful of its solemn responsibility of preserving the right itself. Punishment will be confined to the clearest cases. In *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937), this Court said with respect to freedom of speech and of the press:

> "* * * legislative intervention can find justification only by dealing with the abuse. The rights themselves must not be curtailed."

The same admonition applies to the executive and judicial departments of the government. In reconciling the specific command of the Constitution for protection of the free press with the necessity of maintaining an independent judiciary

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[8] For example, see cases cited in *Thornhill* v. *Alabama*, 310 U. S. 88, 95, note 7.

this Court will not lose sight of its frequent reminders that when any abridgment of the right of a free press and free speech is asserted the Court should be astute to examine the effect of the challenge.[9]

In contempt by publication cases judicial scrutiny of the claim of violation of the constitutional guarantee of a free press should be equally searching. This Court will not overlook its warning that the phrase "freedom of speech and press" is not an empty one and was not lightly used.[10]

The Amicus Curiae is confident that in reconciling the competing rights alleged to be in conflict in this case, the court will weigh the right to discuss and criticize in the scale and that it will not countenance an impairment of that right by any standard of judgment which encourages a lack of judicial self-restraint.

Point II.

The "clear and present danger" test is best suited to the reconciliation of a free press and an independent judicial system.

The "clear and present danger" test affords a proper standard to reconcile the right of a free press with that of an independent judiciary.

It is of paramount importance to the press of this country that this Court should adopt and apply to the judicial exercise of the power to punish for contempt by publication the same definite and certain standard which this Court has recently applied in setting aside legislative infringements of free speech. The content of the guarantee is the same in both cases.

If the press is to remain truly free the line of demarcation between privileged comment and abuse of liberty must

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[9] *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147 (1939).

[10] *Schneider* v. *State* (*Town of Irvington*), *supra*, note 9.

be drawn by a definite and certain standard of guilt. The "reasonable tendency" test applied by the Supreme Court of California exposes the press to the constant threat of having unthought of inferences and implications written into editorial comments by judges who might be prone to exercise censorship in the mistaken belief that the independence of the judiciary is imperiled.

This Court has repeatedly stressed the point that anything that smacks of censorship strikes at the foundation of the freedom of the press, whether the censorship is achieved by licensing or by any other means.

The rationale of *Thornhill* v. *Alabama, supra,* decided by this Court at its last term, makes it plain beyond doubt that the real evil is the brooding omnipresence of fear engendered by a "threat to censor comments on matters of public concern." This Court said (310 U. S. 88, 97):

> "It is not the sporadic abuse of power by the censor but *the pervasive threat inherent in its very existence* that constitutes the danger to freedom of discussion." (Emphasis supplied.)

Since this Court has condemned such a threat when it appears in the form of licensing, it is submitted that a like threat of censorship exists in the application of the "reasonable tendency" test to alleged contemptuous publications.

The Amicus Curiae takes pride in stating that out of a great volume of editorial comment and criticism printed in the columns of the newspapers of this country only an insignificant percentage of these publications has been questioned by the courts in contempt proceedings. However, the issues in this case are not founded upon a quantum of abuses of liberty of the press nor upon actual or alleged sporadic abuses of the judicial power to punish for contempt by publication. Rather, to paraphrase this Court's language in

Thornhill v. *Alabama, supra*, the issues derive from an appreciation of the character of the evil inherent in any form of threat of censorship. Such a threat is inherent in the adoption and application of the "reasonable tendency" test which is not aimed specifically at evils within the allowable area of State control as exercised by its judicial branch.

The "reasonable tendency" test operates as a threat to sweep within its ambit permissible and timely editorial discussion of current public questions. The standard is so vague in its contours and so indefinite as to spread a "dragnet which may enmesh anyone", thus threatening to reduce freedom of the press to "a mere intellectual abstraction" and "an empty phrase".[11]

In an epochal series of decisions involving the constitutional guarantee of free speech, this Court, as recently as 1937, in *Herndon* v. *Lowry*, 301 U. S. 242 (1937), finally clarified and unequivocally readopted the "clear and present danger" test by which speech is penalized only when under the circumstances it produces or is intended to produce a clear and present danger of substantive evils within the allowable area of State control.[12]

The Amicus Curiae respectfully urges upon this Court the adoption and application of the foregoing test to cases involving contempt by publication. Fully recognizing that the maintenance of an independent judiciary is of equal

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[11] The Amicus Curiae submits that Justice Gibson's criticisms of the "reasonable tendency" test are unanswerable. See 98 P. (2d) at pp. 1042-1045 (R. 142-148) and comments (1940) 13 So. Calif. L. Rev. 355; (1938) 48 Yale L. J. 54.

[12] In the decisional line of cases out of which the "clear and present danger" test was finally evolved and readopted as the law of the land, see *Schenck* v. *United States*, 249 U. S. 47 (1919) and concurring opinion of Brandeis and Holmes, J. J., in *Whitney* v. *California*, 274 U. S. 357, 372 (1927).

The "clear and present danger" test was recently reaffirmed in *Thornhill* v. *Alabama*, 310 U. S. 88 (1940) and *Carlson* v. *California*, 310 U. S. 106 (1940). See also *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

importance to the maintenance of a free press, the Amicus Curiae submits that the "clear and present danger" test is best adapted to the adjustment of these two rights.

It has already been shown that no tenable distinction can be drawn between freedom of speech and freedom of the press so far as executive and legislative encroachments are concerned.[13] The Amicus Curiae perceives no basis upon which the courts can constitutionally exempt themselves from the limitations imposed upon the other two branches of the government when dealing with an alleged substantive evil such as an interference with the judiciary by means of contemptuous publications. If anything, the nature of a contempt proceeding is itself a warning against the peril of immunizing the judiciary against the commands of the Constitution applicable to the other two branches of the government.[14]

Nothing is gained in this case by insisting that *Patterson* v. *Colorado*, 205 U. S. 454 (1907), is controlling. In its vigilance over fundamental personal rights and liberty, this Court has never failed to bring doubtful precedents of an earlier date into line with later precedents thought to be more in harmony with the mandates of the Constitution. Since *Patterson* v. *Colorado*, *supra*, decisions of this Court have placed beyond dispute the proposition that freedom of the press as guaranteed by the First Amendment is secured against abridgment by the States by force of the due process clause of the Fourteenth Amendment.[15] In *Patterson* v. *Colorado*, *supra*, Mr. Justice Holmes specifically said that this question was left undecided by the Court. Moreover, in

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[13] *Supra*, note 8.

[14] The rationale of the dissenting opinion of Justice Gibson in the California Supreme Court is unassailable on this point. See 98 P. (2d) at pp. 1042-1043 (R. 141-144).

[15] *Supra*, note 7.

Near v. *Minnesota, supra*, this Court consigned to oblivion the Blackstonian theory adopted by Mr. Justice Holmes in the *Patterson* case that freedom of the press does not comprehend immunity from subsequent punishment for harmless publications.[16] Indeed, Mr. Justice Holmes himself later repudiated this interpretation of the First Amendment.[17] But the test for determining what constitutes harmless publications in contempt proceedings still remains to be clarified.

Further, it should be observed that since this Court dismissed the writ of error in *Patterson* v. *Colorado, supra*, on a jurisdictional ground, Mr. Justice Holmes' comments on the merits of the case must be regarded as *dicta*. In fact, the distinguished Justice sharply modified his view as to the applicable criterion in constructive contempt cases in his dissenting opinion in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918).

Even more important than the distinctions just made, is the fact that since *Patterson* v. *Colorado, supra*, and *Toledo Newspaper Co.* v. *United States, supra*, this Court has greatly clarified the boundaries of free speech and free press and has served notice that it will proscribe any form of abridgement thereof. It is apparent, therefore, that in the light of the more recent doctrine of *Herndon* v. *Lowry, supra*, reaffirmed this year in *Thornhill* v. *Alabama, supra*, and in view of the fact that since the *Toledo* case a few State courts[18] have expressed views which are irreconcilable with the principles laid down by this Court in *Herndon* v. *Lowry, supra*, there is pressing need for a clarification of the limits of the judicial power to punish for contempt by publication.

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[16] This exploded theory is forcefully criticized by Professor Chafee in his Freedom of Speech, p. 8, *et seq.* (1920).

[17] See *Schenck* v. *United States*, 249 U. S. 47 (1919).

[18] See (1938) 48 Yale L. J. 54, 60-61.

Point III.

The editorials in question in this case are not punishable as contemptuous publications when measured by the "clear and present danger" test.

In the interest of conciseness the Amicus Curiae adopts the summary of the contents of the editorials in question as set forth in the brief of petitioners herein. Only such analysis of the editorials is attempted as is essential to demonstrate their propriety when measured by the "clear and present danger" test or, for that matter, any of the judicial tests heretofore applied.

The "pervasive threat" inherent in the existence of some form of censorship is strikingly exemplified by the genesis of the proceedings herein. Following a systematic survey of editorials that had appeared in the "Times" over a period of approximately six months, J. Louis Elkins, as Secretary of the Los Angeles Bar Association on May 13, 1938, subscribed to an affidavit alleging that five editorials published by the "Times", including the three here under review, were contemptuous. This affidavit was filed with the trial court on June 3, 1938 (R. 1, 2, 9-25).

One of the editorials was published on December 21, 1937, or approximately six months before the contempt proceeding was initiated (R. 10). Another was published on February 13, 1938 (R. 14), nearly four months prior to the filing of the Elkins affidavit and a third editorial was published nearly two months prior thereto (R. 17).

The manner in which the editorials were brought to the attention of the court gives color to the contention that the Bar Association was prompted not by a deep-seated conviction that any one of the editorials transgressed the limits of permissible comment and criticism on matters of public importance but rather by a dissatisfaction with the long-

established editorial policy of the "Times", whose editorial columns had been searched over a period of almost six months in the hope that something would turn up to support a charge of contempt.

In effect, the Bar Association had set itself up as a self-appointed public censor of the press. Such a "pervasive threat" would impose an intolerable restraint upon the press.

The Amicus Curiae is vitally interested in the substantial principle that when a court exercises its power to punish for contempt by publication it acts to vindicate a public wrong. If a Bar Association committee is recognized as a proper means of initiating a contempt proceeding on the theory that it is beneficially interested in the outcome, then the door will be opened to other agencies with alleged grievances against the press and the constitutional guarantee will be whittled away by subtle encroachments.

The three editorials upon which the judgments of conviction are based are entirely free from any of the features which exceed the bounds of proper editorial analysis and opinion. None of them scandalizes the court, impeaches the integrity of any judge, imputes improper motives or utters threats. The publications are clearly free from elements which have been adjudged contemptuous by the courts. When measured by the "clear and present danger" test, it is submitted that the judgments of conviction in this case should be reversed.

Nothing in the editorials produces or is intended to produce a "clear and present danger" of the substantive evil of interference with the orderly process of judicial administration. The record does not show that any of the judges before whom the related cases were tried, read, or even heard of the editorials at the time they were published. It was not shown that any of the judges complained that he was embarrassed or intimidated by the editorials during

the pendency of the cases. There was no finding of an express intent to influence any of the judges. None of the three editorials appeared until the verdict of the jury had been rendered (R. 10, 17, 23). Moreover, when viewed from the standpoint of a judge of "ordinary firmness of character" it is manifest that no "clear and present danger" existed.

It is well established that whether or not publications are contemptuous will be determined by a fair interpretation of the language used. The words will be construed in their context and the general tone of the statements will be considered as well as the pertinent circumstances surrounding their publication. When the proceeding is criminal and punitive in nature, every intendment consistent with the defendant's innocence should be indulged.

The editorial "Sit-Strikers Convicted" (R. 11) merely records a forceful but not intemperate approval of a jury verdict which is in accord with the long established policy espoused by the "Times" (R. 43). It refers to the fact that the District Attorney had congratulated the jury and the community upon the verdict and agreed with him that it is one of the "most far-reaching verdicts in the history of this Court". This editorial represents an irreducible minimum of the kind of comment without which a newspaper cannot perform its function in expressing opinion on disputed questions of social and economic policy.

The editorial "The Fall of an Ex-Queen" (R. 17-18) is typical of numerous comments in newspapers of the anti-social effects of political "bossism". It merely points to the moral that the over-ambition for political power of a certain woman was responsible for her downfall and that this is but incident to the vicissitudes attending the rise and fall of political bosses.

The fact that the editorial "Probation for Gorillas?" (R. 23-24) states that "Judge A. A. Scott will make a

serious mistake if he grants probation" does not create a "clear and present danger" of interference with the judicial function. The editorial merely voices the opinion that the good of the community requires a denial of a pending petition for probation, a matter on which informed opinion is often sought from any interested party (R. 53-55). No attack is made upon the judge's character nor is he charged with prejudice or political bias. There is no demand for specific action and there is no threat of retaliation. The editorial is a proper exercise of the function of the press in presenting views on a vital public issue in the field of criminal law enforcement where complaints about ill-advised clemency are frequently expressed.[19]

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[19] There is no more vital issue relating to law enforcement before the public today. The records of the Federal Bureau of Investigation at Washington show that 30 per cent of the more than 13,000 criminals listed as the country's most dangerous have been the recipients of probation or other types of clemency, some of them as many as ten times. The Chief of that Bureau, Hon. J. Edgar Hoover, has frequently spoken out against such ill advised clemency.

In an address entitled, "Law Enforcement and the Citizen", delivered before the Chamber of Commerce of the State of New York, on February 7, 1935, at New York City, Mr. Hoover said: "Millions of dollars are being squandered because of ill-considered, ignorant, or politically controlled parole and clemency actions which release dangerous men and women to prey upon society."

In another portion of this address, Mr. Hoover said: "I repeat that this is a time when law enforcement must fight for its right to conquer the criminal world. To do this, it must combat the aids by which crime flourishes—easy parole, easy commutation, easy probation from 'sob-sister' judges, and, above all, that monumental fake which has too long been perpetrated upon the American public—the prison sentence which says one thing and means another."

In an address entitled, "Patriotism and the War Against Crime", before the annual convention of the Daughters of the American Revolution, on April 23, 1936, at Washington, D. C., Mr. Hoover said: "In scores of instances, we have seen these men arrested, watched them brought into court, and seen them freed on probation. • • • There is too much probation and too little probationary supervision. There is too much parole and practically no follow-up system in many states by which the filthy outflow of countless prisoners is held in control."

In that same address, he later said: "It is a rare thing when a youth is found who has not, to a certain degree, considered the results of his crime

The fact that the three editorials in question were not published until the verdict of the jury had been rendered also points to the pressing need for a clarification by this Court of the application of the "clear and present danger" test to publications alleged to be contemptuous when reference is made to a "pending" proceeding. Some courts have given greater scope to the freedom of editorial com-

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before he committed it, who has not reasoned that even though he is caught, he is still, to a degree, safe because of the mercies of probation or parole."

In an address entitled, "Problems of Identification", delivered before the Twenty-third Annual Convention of the International Association for Identification, at Washington, D. C., on September 30, 1937, Mr. Hoover said: "There is no medicine bottle in the world big enough to hold the nostrums of quacks who believe they can make criminals stop committing crimes by merely asking them to be good. There is no laboratory large enough to act as a central repository for all of the hashish dreams of moo-cow sentimentalists who believe that most criminals are nice boys who are misunderstood and who should be given probation or early parole instead of substantial prison sentences."

In an address entitled, "Hemming in the Criminal", made before the Association of Law Enforcement Officers of the Carolinas at Winston-Salem, North Carolina, on October 24, 1937, Mr. Hoover said: "And while we labor together, let us not forget for one instant that one of our greatest enemies remains the maladministrative scandal of cheap or easy freedom through parole or other forms of clemency."

In an address entitled "Public Duty in Law Enforcement", delivered before the Annual Convention of Life Insurance Presidents on December 3, 1937, Mr. Hoover, in referring to the matter of clemency, said: "Why do they disregard the fact that 30 per cent of the 13,519 dangerous criminals listed in the Federal Bureau of Investigation's single fingerprint file as the country's most desperate kidnapers, racketeers, hoodlums, bank robbers, and extortioners show a record of having been the recipients of parole or other types of clemency not only once, but in many cases as often as 4, 5, 6, 7, 8, 9, and 10 times?"

In an address, "Education for Living", which Mr. Hoover prepared to be delivered over the Blue Network of the National Broadcasting System on January 29, 1938, in a series of broadcasts sponsored by the General Federation of Women's Clubs, and was delivered by one of his assistants when it became impossible for the Director to participate due to his being in the North Woods looking for the hide-out where Mr. Charles Ross was held a kidnap victim, it was pointed out: "Similarly, I cannot help but believe that had the kidnaper and bank robber, Harry Brunette, been taught the fundamental lessons of citizenship and respect for lawful authority in his early life, he would not be serving a life sentence at Alca-

ment and criticism when the judicial proceeding is regarded as concluded.[20]

This Court has not had occasion to give full consideration either to the question of what is a "pending" proceeding or to the effect of a "pending" proceeding upon the weight to be given to freedom of discussion in determining whether there is a "clear and present danger" of creating the substantive evil of interfering with the independence and impartiality of the judicial system.

The dissenting opinion of Justice Gibson in the court below contains trenchant observations upon the difficulty of determining when a proceeding is "pending". As he aptly says:

> "To say that a case is pending until its final adjudication is to state a legal platitude in place of a practical doctrine." [21]

Justice Gibson refers to a rendition of the jury's verdict as "a period of relative finality" after which comment should be freely permitted.[22]

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traz today. His record reveals eleven paroles and three probationary sentences."

Mr. Hoover, in his book entitled "Persons in Hiding", on page 194, after recounting instance after instance of clemency violated on the part of William Dainard and Harmon Waley, the kidnapers of the little Weyerhaeuser boy, has this to say of Waley and treatment afforded him on one occasion: "Waley also was a bad prisoner. But he had a pleasant personality, he was young, and he said he wanted to get out to go home and help his mother. She needed him, he explained, and he had learned his lesson. So persuasive was this good-looking, tall, strong-shouldered youth with dark hair and eyes that he talked himself into a pardon within a year. Nor did it bother him when he was convicted of another robbery within three months. He talked the judge into giving him a suspended sentence. After that he returned almost at once to thievery, and for this was sentenced to from two to five years in Washington State Prison. In spite of a bad conduct record he was out again by September, 1933."

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[20] (1938) 48 Yale L. J. 54, 61, 62.

[21] 98 P. (2d) at p. 1045 (R. 147).

[22] *Ibid.*

The Amicus Curiae earnestly contends that if proper weight is given to the right of free discussion when balanced against the necessity for judicial independence, newspaper publishers should not be constrained to remain silent rather than assume the undue risk of commenting upon a judicial controversy until every conceivable legal procedure in connection therewith has been exhausted.

If this Court should reconcile the two rights involved by application of the "clear and present danger" test, the tendency of some courts to go to extreme lengths in stretching the definition of a "pending" cause would be arrested.

The importance of this consideration in judicial appraisal of the interests involved cannot be overestimated. Again referring to Justice Gibson's dissent, "the editorial page cannot be confined to abstract academic discussion of non-controversial matters or of issues long dead."[23] To perform effectively its function of comment and criticism, the press must deal with timely questions of current public concern. If it is compelled to abstain from discussion until every controversial aspect of an issue has been reduced to colorless facts, the right of the press to act as "one of the great interpreters between the government and the people" would be indeed barren.

Finally, it is necessary to refer to *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918), the only decision of this Court which, strictly speaking, passed upon the merits of a case involving constructive contempt by publication.[24]

Since the argument herein in support of the "clear and present danger" test sufficiently indicates the objections to the "reasonable tendency" test applied in the majority opinion in the *Toledo* case, the Amicus Curiae will not bur-

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[23] 98 P. (2d) at p. 1043 (R. 144).

[24] In *Craig* v. *Hecht*, 263 U. S. 255 (1923) the Court refused to review the case since petitioner relied upon *habeas corpus* when an appeal was open to him.

den the Court with further discussion of the objections to the "reasonable tendency" test. It is important, however, to note that the *Toledo* case antedates the basic decisions of this Court in the free press cases beginning with *Near* v. *Minnesota, supra.* In the years intervening since the *Toledo* case this Court not only has manifested an unswerving determination to accord the greatest possible weight to freedom of written discussion but it has also adopted the "clear and present danger" test in free speech cases. In those cases it has declared principles differing in no respect from those applicable to the press. There is every reason to believe, therefore, that this Court will reconsider and modify the doctrine of the *Toledo* case so as to bring it into harmony with the test of *Herndon* v. *Lowry, supra.*

It is worthy of note that legal scholars have subjected the majority opinion in the *Toledo* case to pungent criticism.

Mr. Justice Frankfurter and Dean James M. Landis (then Professors of Law in Harvard University) [25] in an article cited in the footnote discuss the limitations upon Congressional power with respect to the so-called "inherent powers" of inferior Federal courts to remove obstructions to the discharge of their work, namely, the power to punish for contempt. While deploring the use of the phrase "inherent powers" as "a constant invitation to think in words instead of things", the authors nevertheless recognize that the courts must be "invested with incidental powers of self-protection".[26] The authors then examine the history of the Act of 1831, the statute which the Court was called upon to construe in the *Toledo* case, and conclude as follows: [27]

> "The history of the times, the records of Congress, contemporary judicial construction, contemporary legal

[25] Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers (1924) 37 Harv. L. Rev. 1010, especially pp. 1029-1038.

[26] For the present wording of the Act, see 28 U. S. C. A. § 385 (1928).

[27] Frankfurter & Landis, *op. cit. supra* at p. 1029.

> writing, the reflex of contemporary State legislation, a series of adjudications culminating in a controlling Supreme Court decision should, one would suppose, have foreclosed any other opinion but that the Act of 1831 was intended to, and did, limit drastically the authority of the inferior Federal courts as theretofore exercised in the administration of the law of contempts."

In the light of the foregoing history the writers assert that Mr. Chief Justice White in the majority opinion "completely distorted" the situation giving rise to the Act of 1831 when he said that it was intended "to prevent the danger • • • of attempts to exercise a power not possessed which • • • had been sometimes done in the exercise of legislative power". To use Chief Justice White's own words, he concluded that the Act of 1831 "conferred no power not already granted and imposed no limitations not already existing".

This construction, the authors say, is based upon historical misinterpretations apparently induced in part by the brief for the Government upon which Mr. Chief Justice White relied. The authors observe [28] that

> "In truth, the abuse was not all 'in the exercise of legislative power'; the demonstrated abuse was in the exercise of judicial power. On its face the Act dealt with courts and not with Congress."

This criticism is pertinent to the issues in this case insofar as it may throw light on the need for a reconsideration of the doctrine of the *Toledo* case.

The Amicus Curiae is aware of the probability that such a reconsideration will also include a comparison of the "actual obstruction" test supported by the dissenting opinion of Justices Holmes and Brandeis in the *Toledo* case. This test was urged by Justice Gibson in his dissenting

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[28] *Ibid* at p. 1030.

opinion in the lower court in this case [29] and it has been applied by a few State courts.[30] Should this test find acceptance in this Court, the Amicus Curiae submits that its application to the editorials in this case would require a reversal of the judgment of conviction. The analysis of these editorials, as set forth above, shows that there was no actual obstruction or interference with the administration of justice. The Amicus Curiae also is convinced that the editorials are not contemptuous even when measured by the "reasonable tendency" test to which it has offered objections.

However, for the reasons already stated, it is respectfully urged that the "clear and present danger" test be adopted as the standard best suited to the full preservation of the cherished liberty of a free press without sacrifice of any part of the equally important right of a fearless, impartial and independent judiciary. In this way a definite and certain single standard of judgment will be applied in both free speech and free press cases on issues of the same substance so far as the content of the constitutional guarantees in the First and Fourteenth Amendments is concerned.

Conclusion.

It is respectfully submitted that the judgment of conviction of petitioners should be reversed.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMICUS CURIAE,

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[29] 98 P. (2d) at pp. 1043, 1044 (R. 143, 147).

[30] *State* v. *American News Co.*, 64 S. D. 385, 266 N. W. 827 (1936). *Cf. Nixon* v. *State*, 207 Ind 426, 193 N. E. 591 (1935).